

Attorney or Party Name, Address, Telephone and Fax Number, and CA State Bar No.		FOR COURT USE ONLY
Leonard M. Shulman - Bar No. 126349 Melissa R. Davis - Bar No. 245521 SHULMAN HODGES & BASTIAN LLP 26632 Towne Centre Drive, Suite 300 Foothill Ranch, California 92610 Telephone: (949) 340-3400 Facsimile: (949) 340-3000 Email: lshulman@shbllp.com; mdavis@shbllp.com		CASE NO.: 8:09-bk-17418 RK Chapter 7
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA		
In re: GERALD M. ALLEN, Debtor.		

NOTICE OF SALE OF ESTATE PROPERTY

Sale Date: January 26, 2010	Time: 2:30 P.M.
Location: Courtroom 5D United States Bankruptcy Court, Ronald Reagan Federal Building and United States Courthouse, 411 West Fourth Street, Santa Ana, California 92701	

Type of Sale: ☒ Public ☐ Private Last date to file objections: **January 12, 2010**
(14 days prior to the hearing)

Description of Property to be Sold: **The Estate's interest in real property located at 2601 North Ashwood Street, Orange, California - see the attached Notice of Hearing on Motion and Chapter 7 Trustee's Motion for Order: (1) Authorizing Sale of Residential Real Property Free and Clear of Liens; (2) Approving Bidding Procedures Utilized; and (3) Granting Related Relief; Memorandum of Points and Authorities and Declaration of John M. Wolfe in Support ("Notice")**

Terms and Conditions of Sale: **See the attached Notice**

Proposed Sale Price: **See the attached Notice**

Overbid Procedure (If Any): **See the attached Notice**

If property is to be sold free and clear of liens or other interests, list date, time and location of hearing:

January 26, 2010 at 2:30 P.M., in Courtroom 5D, 411 West Fourth Street, Santa Ana, California 92701

Contact Person for Potential Bidders (include name, address, telephone, fax and/or e:mail address):

Leonard M. Shulman, Esq. and Melissa R. Davis, Esq.
Shulman Hodges & Bastian LLP
26632 Towne Centre Drive, Suite 300, Foothill Ranch, CA 92610
Telephone: (949) 340-3400; Facsimile: (949) 340-3000

Date: **January 5, 2010**

COPY

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Proposed Attorneys for John M. Wolfe,
Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA, SANTA ANA DIVISION

In re

GERALD M. ALLEN,

Debtors.

Case No. 8:09-bk-17418-RK

Chapter 7

**NOTICE OF HEARING ON MOTION AND
CHAPTER 7 TRUSTEE'S MOTION FOR
ORDER:**

- (1) AUTHORIZING SALE OF
RESIDENTIAL REAL PROPERTY
FREE AND CLEAR OF LIENS;**
- (2) APPROVING BIDDING
PROCEDURES UTILIZED; AND**
- (3) GRANTING RELATED RELIEF**

**MEMORANDUM OF POINTS AND
AUTHORITIES AND DECLARATION OF
JOHN M. WOLFE IN SUPPORT THEREOF**

**[Real Property Located at:
2601 North Ashwood Street
Orange, California 92865]**

Date: January 26, 2010
Time: 2:30 P.M.
Place: Courtroom 5D
411 West Fourth Street
Santa Ana, CA 92701

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1 **TO THE HONORABLE ROBERT KWAN UNITED STATES BANKRUPTCY**
2 **JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, AND ALL INTERESTED**
3 **PARTIES AND THEIR COUNSEL OF RECORD:**

4 **I. NOTICE**

5 **NOTICE IS HEREBY GIVEN** that on **January 26, 2010 at 2:30 P.M.**, in Courtroom
6 5D of the above-entitled Court located at Ronald Reagan Federal Building and United States
7 Courthouse, 411 West Fourth Street, Santa Ana, California 92701, John M. Wolfe, Chapter 7
8 Trustee ("Trustee") for the bankruptcy estate ("Estate") of Gerald M. Allen ("Debtor"), will
9 bring a Motion for an Order: (1) Authorizing Sale of Residential Real Property Free and Clear of
10 Liens; (2) Approving Bidding Procedures Utilized; and (3) Granting Related Relief (the "Sale
11 Motion").

12 As set forth below, the Trustee has received an offer from Richard Share, or his nominee
13 or assign ("Buyer") to purchase the residential real property located at 2601 North Ashwood
14 Street, Orange, California 92865 ("Property"), for the total sum of \$368,000 ("Purchase Price").
15 The Trustee believes the proposed sale of the Property, subject to the Sale Terms and Bidding
16 Procedures (both terms defined below) is in the best interest of the Estate and its creditors.
17 Through the sale, the Trustee is expected to generate net proceeds (after payment of all liens,
18 encumbrances and other costs associated with the sale) of approximately **\$37,200**. In the event
19 the Property is sold to a successful higher bidder, the estimated net proceeds will increase
20 accordingly.

21 The Sale Motion is based upon this Notice of the Sale Motion, the Sale Motion and
22 Memorandum of Points and Authorities in Support thereof, the Declaration of John M. Wolfe
23 ("Wolfe Declaration"), the pleadings and files in the Debtor's bankruptcy case, and upon such
24 further oral and documentary evidence as may be presented to the Court in support of the Sale
25 Motion.

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1 **NOTICE IS HEREBY FURTHER GIVEN** that that any opposition or other responsive
2 paper to the Sale Motion must be filed with the Clerk of the above-entitled Court and a copy
3 served on Shulman Hodges & Bastian LLP to the attention of Leonard M. Shulman at the
4 address indicated above and the Office of the United States Trustee, Ronald Reagan Federal
5 Building and United States Courthouse, 411 West Fourth Street, #9041, Santa Ana, California
6 92701-8000 at least fourteen days prior to the hearing in the form required by Local Bankruptcy
7 Rule 9013-1(f).

8 **NOTICE IS HEREBY FURTHER GIVE** that failure to file a timely response may be
9 deemed as consent to the relief requested in the Motion. **SEE, LOCAL BANKRUPTCY**
10 **RULE 9013-1(h).**

11
12 Dated: December 31, 2009

SHULMAN HODGES & BASTIAN LLP

/s/ Leonard M. Shulman

By: _____

Leonard M. Shulman

Melissa R. Davis

Counsel for John M. Wolfe the Chapter 7 Trustee

II. MOTION

In support of the Sale Motion, the Trustee respectfully represents as follows:

A. Case Commencement

On July 22, 2009, the Debtor filed a voluntary bankruptcy petition under Chapter 7 of the Bankruptcy Code.

John M. Wolfe is the duly qualified, acting and appointed Chapter 7 trustee of the Debtor's Estate.

On his Bankruptcy Schedule A, the Debtor lists his ownership interest in the Property¹ and lists it as having a value of \$322,800. Debtor's Bankruptcy Schedule D indicates that the Property has two secured liens against it in the total amount of \$272,800².

On his Bankruptcy Schedule C, the Debtor has claimed an homestead exemption in the Property in amount of \$50,000 pursuant to C.C.P. § 704.730(a)(1).

True and correct copies of the Debtor's Bankruptcy Schedules A, C and D are attached to the Wolfe Declaration as **Exhibit "1."**

B. Terms of the Sale

The Trustee has received an offer from the Buyer, Richard Share, or his nominee or assign to purchase the Property for \$368,000, all cash. The terms of the offer from the Buyer are set forth in the letter attached to the Wolfe Declaration as **Exhibit "2"**.

The Buyer is a principal of Poser Investments, Inc. ("Poser"). Poser is a judgment lien creditor of the Debtor having recorded a judgment lien against the Property with the Orange County Recorder's Office on or about April 10, 2009 (Document Number 2009000176099), in the amount of \$9,217.89 as of March 10, 2009 ("Poser Lien"). The Poser Lien will not be paid

¹ The legal description of the Property is as follows: Lot(s) 21 of Tract No. 4557, in the City of Orange, County of Orange, State of California, as per map recorded in Book 160 Page(s) 34 to 36 inclusive of Miscellaneous Maps, in the office of the County Recorder of said County. The legal description for the Property is believed to be accurate but may be corrected or updated by the title company in the transfer documents as necessary to complete the proposed sale transaction.

² The Debtor's Schedule D indicates a first trust deed in favor of GMAC Mortgage in the amount of \$250,000 and a second trust deed in favor of Ditech in the amount of \$22,800.

1 through escrow on the sale of the Property. The Poser Lien will be waived as part of the Buyer's
2 consideration paid to the Estate for the purchase of the Property.

3 The Trustee seeks to sale the Property pursuant to the following principal terms and
4 conditions (collectively referred to herein as the 'Sale Terms'):

5 a. Purchase Price. The purchase price for the Property shall be \$368,000 ("Purchase
6 Price"), all cash.

7 b. Deposit. The Buyer shall pay to the Trustee a cash deposit in good funds in the
8 amount of \$36,800 upon the filing of this Sale Motion, with the balance of the Purchase Price to
9 be paid on the close of escrow.

10 c. Escrow Holder and Title Company. The escrow holder and title company shall be
11 the Trustee's choice.

12 d. Closing. Close of escrow shall be within thirty days after entry of an order
13 approving this Sale Motion, or as extended by the mutual agreement of the Trustee and the
14 Buyer. The balance of the cash Purchase Price will be paid by the Buyer in good funds at the
15 close of escrow.

16 e. Vacant Condition of Property. The Buyer, at its own expense, shall arrange for
17 the Property to be in vacant condition no later than seven days prior to the close of escrow. A
18 condition of closing shall be that the Property is vacant.

19 f. Expenses. The Estate shall pay all expenses of escrow, including but not limited
20 to, the payment of a CLTA title insurance policy. There shall be no broker's fees or
21 commissions.

22 g. Bankruptcy Court Approval. The sale is expressly conditioned on approval of the
23 United States Bankruptcy Court for the Central District of California, Santa Ana Division and
24 entry of a final order approving this Sale Motion.

25 h. Title Insurance: The title insurance policy shall be subject only to liens,
26 encumbrances, clouds and other matters as may appear on the preliminary title report, that are
27 not to be removed at the close of escrow, and have not been objected to by Buyer. Should the
28 Trustee be unwilling or unable to eliminate those title matters disapproved by Buyer, the Trustee

1 may terminate the sale agreement; should the Trustee fail to deliver good and marketable title,
2 the Trustee and the Buyer may terminate the sale agreement. In either case, the Buyer's deposit
3 shall be returned to Buyer, and Buyer shall have no recourse against Seller, John M. Wolfe,, as
4 Bankruptcy Trustee, individually, or the Shulman, Hodges & Bastian, LLP, the Estate or the
5 Debtor, or any parties involved in the transaction.

6 i. The Buyer is a principal of Poser who is a judgment lien creditor of the Debtor
7 having recorded a judgment lien against the Property with the Orange County Recorder's Office
8 on or about April 10, 2009 (Document Number 2009000176099), in the amount of \$9,217.89 as
9 of March 10, 2009. The Poser Lien will not be paid through escrow on the sale of the Property.
10 The Poser Lien will be waived as part of the consideration to be paid to the Estate for the
11 purchase of the Property. However, if a Successful Bidder, and not the Buyer, is the purchaser
12 of the Property, the Poser Lien will be paid through escrow on the sale and in such event, the
13 Property will be sold free and clear of such lien.

14 j. No Representations. The sale is "as is – where is" based on such condition as
15 exists on the date of the physical inspection of the Property. A termite inspection, termite
16 repairs, and smoke alarm requirement are waived. Thus, other than as stated above, the Trustee
17 is not making any representations or warranties, either express or implied, as to the Property's
18 condition, uses (prior, present and future), or otherwise. Moreover, the Trustee shall not warrant
19 or represent the Property's compliance with any applicable federal, state or local environmental
20 laws, zoning laws or applicable regulation. The Buyer shall agree that the Buyer is acquiring the
21 Property "as is," with all faults and conditions then existing on the Property including any
22 hazardous substances or hazardous waste that may be located on, under or around the Property,
23 whether known or unknown, and the Buyer shall assume all responsibilities for all such faults
24 and conditions, whether disclosed or not. Moreover, the Buyer shall be expressly aware and
25 fully informed that the Trustee is selling the Property in his capacity as the Chapter 7 Trustee of
26 the Debtor's Estate.

27 k. Acknowledgement of the Trustee's Capacity. Since the Trustee is selling the
28 Property in his capacity as the Chapter 7 Trustee for the Debtor's Estate and further, since the

Property is an asset of the Debtor's Estate, the resolution of any and all disputes between the parties herein concerning the sale transaction shall be resolved by the United States Bankruptcy Court for the Central District of California, Santa Ana Division. Further, the Trustee has agreed that if a dispute arises, such dispute may initially be resolved through the Mediation Program pending in the United States Bankruptcy Court for the Central District of California.

l. Unknown Contingencies. If the Trustee is unable to complete escrow because of unknown defects in the title, or because the liens and encumbrances exceed the amount known to the Trustee, or by being divested of title by the Bankruptcy Court, or because the income tax consequences of the sale are excessive, or for any other unknown conditions, the Buyer's sole damages shall be limited to the refunds of any Deposit less escrow charges.

m. Good Faith Finding. The proposed sale has been brought in good faith and has been negotiated on an "arms length" basis. The negotiations with the Buyer have resulted in an offer to sell the Property that will have substantial benefit. Accordingly, the sale is in good faith and should be approved. The Trustee shall request such a finding pursuant to Bankruptcy Code Section 363 (m) at the hearing on this Sale Motion.

n. Overbids. The sale of the Property is subject to the Bidding Procedures described below

C. Overbid Procedures

Trustee has determined that it would benefit the Estate by permitting all interested parties to receive information and bid for the Property instead of selling to the Property to the Buyer on an exclusive basis. Accordingly, in order to obtain the highest and best offer for the benefit of the creditors of this Estate, the Trustee also seeks Court approval of the following bidding procedures ("Bidding Procedures"):

a. In order to take into account that the Poser Lien will need to be paid in the event that the Property is sold to a Successful Bidder and not the Buyer, any initial overbid for the Property shall be in the amount of at least \$386,000, with subsequent overbids in increments of at least \$5,000 each. Pursuant to Bankruptcy Code Section 363(k), the Buyer, as a principal of Poser, shall be allowed to credit bid the Poser Lien in any overbid submitted by the Buyer.

b. Overbids must be in writing and be received by the Trustee and the Trustee's counsel, Shulman Hodges & Bastian LLP to the attention of Leonard M. Shulman, by no later than the time of hearing on the Sale Motion.

c. The overbidder must seek to acquire the Property on terms and conditions not less favorable to the Estate than the terms and conditions to which the Buyer has agreed to purchase the Property.

d. If overbids are timely received, the final bidding round shall be held concurrent with the hearing on this Sale Motion, in order to allow all potential bidders the opportunity to overbid and purchase the Property.

e. At the hearing on this Sale Motion, the Trustee and his counsel shall review each overbid and identify the highest and best offer for the Property received and seek Court approval of the sale of the Property to the successful bidder ("Successful Bidder").

f. In the event Successful Bidder fails to close on the sale of the Property within the time parameters approved by this Court, the Trustee will be released from his obligation to sell the Property to the Successful Bidder and the Trustee may then sell the Property to the first back-up bidder approved by this Court at the hearing on this Motion ("First Back-Up Bidder").

The foregoing Bidding Procedures will provide for an orderly completion of the sale of the Property and ensures that potential overbidders are provided with full disclosure as to the Bidding Procedures and the specific Property to be sold. By having all bidders compete on similar terms, the interested parties and the Court may compare competing bids in order to realize the highest benefit for the Estate. Thus, the Trustee is requesting that the Court approve the Bidding Procedures as a fair and reasonable method of realizing the highest and best price for the Property for the benefit of the Estate and its creditors.

D. Treatment of Liens and Encumbrances Through the Sale

Through escrow on the sale of the Property, outstanding real property taxes will be paid as well as the liens of GMAC Mortgage and Ditech.

The Poser Lien will not be paid through escrow on the sale of the Property. The Poser Lien will be waived as part of the Buyer's consideration paid to the Estate for the purchase of the

Property. However, if a Successful Bidder, and not the Buyer, is the purchaser of the Property, the Poser Lien will be paid through escrow on the sale and in such event, the Property will be sold free and clear of such lien.

The Trustee is not aware of any other liens or encumbrances against the Property but out of an abundance of caution, except for the Poser Lien, seeks to the sell the Property free and clear of liens and encumbrances.

E. Estimated Proceeds from the Sale

The Trustee anticipates that the sale will generate net funds for the Estate as follows:

Purchase Price	\$368,000
Less: Lien #1- GMAC	(\$250,000)
Less: Lien #2 - Ditech	(\$22,800)
Less: Real Property Taxes (estimated)	(\$500)
Less: Homestead Exemption	(\$50,000)
Estimated Costs of Sale	(\$7,500)
Estimated Net Equity to the Estate	\$37,200

In the event the Property is sold to a successful higher bidder, the estimated net proceeds will increase accordingly.

III. MEMORANDUM OF POINTS AND AUTHORITIES

A. Court May Authorize the Sale of the Property When There is a Good Faith

Purchaser

The Trustee, after notice and hearing, may sell property of the Estate. 11 U.S.C. §363 (b). The proponent of the sale must establish that there is a sound business purpose for the sale, that the sale is in the best interests of the Estate, i.e., the sale is for a fair and reasonable price, that there is accurate and reasonable notice to creditors and that the sale is made in good faith. In re Wilde Horse Enterprises, Inc., 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991); In re Lionel Corp., 722 F.2d 1063, 1069 (2d Cir. 1983). Business justification would include the need to close a sale to one of very few serious bidders where an asset has been extensively shopped and a delay could jeopardize the transaction. See, e.g., In re Crowthers McCall Pattner, Inc., 114 B.R. 877, 885 (Bankr. S.D.N.Y. 1990) (extreme difficulty finding a buyer justified merger when buyer found). The Trustee's proposed sale of Property meets the foregoing criteria.

1. Sound Business Purpose

The Ninth Circuit in In re Walter, 83 B.R. 14 (Bankr. 9th Cir. 1988) has adopted a flexible, case by case test to determine whether the business purpose for a proposed sale justifies disposition of property of the estate under Section 363(b). In Walter, the Ninth Circuit, adopting the reasoning of the Fifth Circuit in In re Continental Air Lines, Inc., 780 F.2d 1223 (5th Cir. 1986), and the Second Circuit in In re Lionel Corp., 722 F.2d 1063 (2d Cir. 1983), set forth the following standard to be applied under Bankruptcy Code Section 363(b).

Whether the proffered business justification is sufficient depends on the case. As the Second Circuit held in Lionel, the bankruptcy judge should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike. He might, for example, look to such relevant factors as the proportionate value of the assets to the estate as a whole, the amount of lapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasingly or decreasing in value. This list is not intended to be exclusive, but merely to provide guidance to the bankruptcy judge.

Walter, supra, at 19-20 [quoting In re Continental Air Lines, Inc., 780 F.2d 1223, 1226 (5th Cir. 1986)].

In the present case, there is a sound business purpose for the sale. The sale as proposed will provide net for the Estate of approximately \$37,200. The Trustee believes that the sale pursuant to this Sale Motion will be at fair market value because it is the highest offer that the Estate has received thus far and it will yield significant equity for the Estate to make the sale. If the sale is not approved, the Estate will not realize any funds and thus there will be no funds to distribute to the Estate's creditors until another buyer can be found. With the current state of the economy, it is very uncertain how long it will take to find another buyer and at what price for the Property. The proposed sale gives certainty and allows the Trustee to close the transaction quickly with no broker's fees or commissions.

Therefore, the Trustee respectfully submits that, if this Court applies the good business reason standard suggested by the Second Circuit in Lionel, the Sale Motion should be approved.

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2. The Sale Serves the Best Interests of the Estate and Creditors

The benefits to the Estate will be substantial. The Trustee has made a business decision that it is in the best interest of the creditors of this Estate that this Sale Motion be approved. If the sale is approved, there will be a net equity of approximately \$37,200 in cash, which is much more than the Estate would have if the sale is not approved. In the event the Property is sold to a Successful Bidder, the net proceeds paid to the Estate will increase. Accordingly, it would be in the best interest of the Estate if the sale is approved.

3. Accurate and Reasonable Notice

It is expected that notice of this Sale Motion will satisfy the requirements for accurate and reasonable notice and will be appropriate under the circumstances. The Trustee shall provide notice of the proposed sale of the Property to the proper parties. The Notice of this Sale Motion will include a summary of the terms and conditions of the proposed sale, how to file an objection, and a general description of the Property. The Trustee submits that the notice requirements will have been satisfied, thereby allowing creditors and parties in interest an opportunity to object to the sale. Hence, no further notice should be necessary.

4. The Sale is Made in Good Faith

The proposed sale has been brought in good faith and has been negotiated on an “arms length” basis. The court in Wilde Horse Enterprises, set forth the factors in considering whether a transaction is in good faith. The court stated:

“Good faith” encompasses fair value, and further speaks to the integrity of the transaction. Typical 'bad faith' or misconduct, would include collusion between the seller and buyer, or any attempt to take unfair advantage of other potential purchasers. . . . And, with respect to making such determinations, the court and creditors must be provided with sufficient information to allow them to take a position on the proposed sale. (citations omitted)

Id. at 842.

In the present case, the negotiation of the proposed sale was an arms-length transaction. The negotiations with the Buyer have resulted in an offer to sell the Property that will have substantial benefit. As set forth in the Notice of the Sale Motion, the creditors will have been provided with sufficient notice of the sale. Accordingly, the sale is in good faith and should be

approved. The Trustee shall request such a determination pursuant to Bankruptcy Code Section 363 (m) at the hearing on this Sale Motion.

B. Sale of the Property Free and Clear of Liens and Encumbrances Should be Permitted

Bankruptcy Code Section 363(f) allows a Trustee to sell property of the bankruptcy estate “free and clear of any interest in such property of an entity,” if any one of the following five conditions is met:

(1) applicable non-bankruptcy law permits a sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept money satisfaction of such interest.

Bankruptcy Code Section 363(f).

Section 363(f) is written in the disjunctive and thus only one of the enumerated conditions needs to be satisfied for Court approval to be appropriate.

1. Section 363(f)(2)- Consent

The sale of Property is proper pursuant to Section 363(f)(2). The Trustee believes that secured creditors GMAC Mortgage and Ditech will have no objection to the sale under the terms set forth herein as their liens will be paid.

As to the Poser Lien, such lien will be waived as a part of the Buyer’s consideration for the purchase of the Property. However, if a Successful Bidder, and not the Buyer, is the purchaser of the Property, the Poser Lien will be paid through escrow on the sale and in such event, the Property will be sold free and clear of such lien.

The Trustee does not anticipate that any secured creditor will object to the Sale Motion.

Courts have approved sales under Bankruptcy Code Section 363(f) even where the sale price did not exceed the value of the liens asserted on the property so long as the sale is for fair

1 market value. In re Terrace Gardens Park Partnership, 96 B.R. 707 (Bankr. W.D. Tex. 1989); In
2 re Beker Indus. Corp., 63 B.R. 474, 477 (Bankr. S.D.N.Y. 1986).

3 Thus, approval for the sale of the Property free and clear of Liens and Encumbrances in
4 the manner provided herein is appropriate.

5 **C. The Court has Authority to Waive the Ten-Day Stay of Sale**

6 Federal Rule of Bankruptcy Procedure 6004(h) provides that “[a]n order authorizing the
7 use, sale or lease of property other than cash collateral is stayed until the expiration of ten (10)
8 days after entry of the order, unless the Court orders otherwise.” Fed. Rule Bankr. Proc. 6004(h).
9 Currently, escrow is scheduled to close ten (10) days after the hearing on the Sale Motion. The
10 Trustee desires to close the sale of the Property as soon as practicable after entry of an order
11 approving the sale. Accordingly, the Trustee requests that the Court, in the discretion provided it
12 under Federal Rule of Bankruptcy Procedure 6004(h), waive the ten-day stay requirement.

13 **D. The Court Has the Authority to Approve the Bidding Procedures**

14 Implementation of the Bidding Procedures is an action outside of the ordinary course of
15 business. Bankruptcy Code Section 363(b)(1) provides that a trustee “after notice and hearing,
16 may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11
17 U.S.C. § 363. Furthermore, under Bankruptcy Code Section 105 (a), “[t]he court may issue any
18 order, process, or judgment that is necessary or appropriate to carry out the provisions of this
19 title.” 11 U.S.C. § 105. Thus, pursuant to Bankruptcy Code Sections 363(b)(1) and 105(a), this
20 Court may authorize the implementation of overbidding procedures. *Id.*

21 The Ninth Circuit, in a case under the Bankruptcy Act, recognized the power of a
22 bankruptcy court to issue orders determining the terms and conditions for overbids with respect
23 to a sale of estate assets. In re Crown Corporation, 679 F.2d 774 (9th Cir. 1982). The Crown
24 Corporation court entered an order specifying the minimum consideration required for an
25 overbid as well as the particular contractual terms required to be offered by overbidders. *Id.* at
26 777. The Crown Corporation decision also approves an order requiring and setting the amount
27 of potential overbidder’s deposits and authorized courts to determine the disposition of such
28 deposits. *Id.* While the discussion is not extensive, the Crown Corporation decision recognizes

the authority of bankruptcy courts to order the implementation of bidding procedures such as those proposed in the present case.

1. **The Overbid Procedures are Untainted by Self-Dealing**

The overbid procedures have been brought in good faith and have been negotiated on an arms length basis. Therefore, there is no prospective taint in dealings between the Trustee and any potential bidders.

2. **The Overbid Procedures Encourage Bidding and are Fair in Amount**

The Bidding Procedures are designed to encourage, not hamper, bidding, and are reasonable under the circumstances. The Bidding Procedures are intended to provide potential overbidders with adequate information to make an informed decision as to the amount of their bid and the validity of their bid.

3. **The Overbid Procedures are Fair, Reasonable and Serve the Best Interests of the Estate**

The proposed Bidding Procedures serve the Estate in several ways. First, the Bidding Procedures themselves are fair, reasonable and productive. They will permit the Trustee to conduct an orderly sale and obtain the best possible price on the best possible terms for the Property.

The Bidding Procedures will ensure that all bids will be comparable. The Trustee will determine which bid is the highest and best for the Estate. The comparability requirement of the Bidding Procedures will make it possible to accomplish this task.

The Bidding Procedures will help the Trustee to obtain the highest and best possible price for the Property. The Bidding Procedures institute minimum overbid increments which the Trustee believes are reasonable. Thus, the Trustee will be able to obtain substantial benefit for this Estate upon the sale of the Property from competing bids.

The most important benefit of the Bidding Procedures to the Estate is that their implementation will enable the consummation of the proposed sale. Implementation of the Bidding Procedures is an essential component of consummating the sale of the Property and maximizing the value of the Property for the Estate and creditors. The Bidding Procedures

proposed by the Trustee are fair and provide for a "level playing field" for all prospective bidders with respect to the Property and as such, should be approved.

E. The Buyer Should be Allowed to Credit Bid its Claim

Bankruptcy Code Section 363(k) provides that at a sale under section 363(b) of property "that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property."

Here, the Trustee has no reason to dispute the validity of the Poser Lien and underlying claims. As such, the Trustee believes that the Buyer, as a principal of Poser, should be allowed to credit bid the Poser Lien in any overbid submitted by the Buyer.

IV. CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court enters an Order as follows:

1. Approving the Sale Motion and approving the sale of the Property to the Buyer or the Successful Bidder, as the case may, pursuant to the Sale Terms including the sale of the Property free and clear of all liens and encumbrances;

2. Determining that there is a sound business reason for the sale;

3. Determining that the sale is in the best interest of the Estate;

4. Determining that accurate and reasonable notice of the sale has been given;

5. Determining that the Buyer is in good faith and entitled to protection under Bankruptcy Code Section 363(m);

6. Approving the Bidding Procedures set forth herein;

7. Waiving the ten-day stay of the order approving the sale of the Property under Federal Rules of Bankruptcy Procedure 6004(h);

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1 8. Authorizing the Trustee to sign any and all documents necessary to conduct a sale
2 of the Property pursuant to the Sale Terms set forth above; and

3 9. For such other and further relief as the Courts deems just and proper.
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5 Dated: December 31, 2009

Respectfully submitted,

6 **SHULMAN HODGES & BASTIAN LLP**

7 /s/ Leonard M. Shulman

8 By: _____

Leonard M. Shulman

Melissa R. Davis

Counsel for John M. Wolfe the Chapter 7 Trustee
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DECLARATION

DECLARATION OF JOHN M. WOLFE

I, John M. Wolfe, declare as follows:

1. I am the Chapter 7 Trustee ("Trustee") of the bankruptcy estate of Gerald M. Allen ("Debtor").

2. I make this declaration in support of my Motion For Order: (1) Authorizing Sale of Residential Real Property Free and Clear of Liens; (2) Approving Bidding Procedures Utilized; and (3) Granting Related Relief ("Sale Motion"). If compelled to so, I would be able to competently testify to the following factual assertions to the best of my belief, knowledge and information. Any capitalized terms not otherwise defined herein shall have the meaning set forth in the Sale Motion.

3. On July 22, 2009, the Debtor filed a voluntary bankruptcy petition under Chapter 7 of the Bankruptcy Code.

4. On his Bankruptcy Schedule A, the Debtor lists his ownership interest in the Property and lists it as having a value of \$322,800. Debtor's Bankruptcy Schedule D indicates that the Property has two secured liens against it in the total amount of \$272,800³.

5. On his Bankruptcy Schedule C, the Debtor has claimed an homestead exemption in the Property in amount of \$50,000 pursuant to C.C.P. § 704.730(a)(1).

6. True and correct copies of the Debtor's Bankruptcy Schedules A, C and D are attached hereto as **Exhibit "1."**

7. I have received an offer from the Buyer to purchase the Property for \$368,000 with a 10% deposit and the remainder of the price to be paid upon the close of escrow.

8. Attached hereto as **Exhibit "2"** is a true and correct copy of the letter from the Buyer setting forth the offer for the purchase of the Property.

9. I am advised that the Buyer is a principal of Poser who is a judgment lien creditor of the Debtor having recorded a judgment lien against the Property with the Orange County Recorder's Office on or about April 10, 2009 (Document Number 2009000176099), in the amount of \$9,217.89 as of March 10, 2009 ("Poser Lien"). The Poser Lien will not be paid

³ The Debtor's Schedule D indicates a first trust deed in favor of GMAC Mortgage in the amount of \$250,000 and a second trust deed in favor of Ditech in the amount of \$22,800.

1 through escrow on the sale of the Property. The Poser Lien will be waived as part of the Buyer's
2 consideration for the purchase of the Property. However, if a Successful Bidder, and not the
3 Buyer, is the purchaser of the Property, the Poser Lien will be paid through escrow on the sale
4 and in such event, the Property will be sold free and clear of such lien

5 10. I propose to sell the Property on Sale Terms described in the Sale Motion,
6 including that the sale is subject to the Bidding Procedures and the condition that the Property
7 will be sold on an "as is - where is" basis as exists on the date of a physical inspection of the
8 Property, with all faults and conditions then existing at Property, and the Buyer shall agree: (1)
9 that I am not making any representations, warranties, either express or implied, as to the
10 condition, use (prior, present and future), or otherwise of the Property; and (2) other than the
11 physical inspection, I shall not provide the Buyer with any reports as to the conditions or uses for
12 the Property.

13 11. I believe that the proposed sale, subject to the proposed Bidding Procedures set
14 forth in the Sale Motion, is the best means for maximizing the value of the Property for the
15 Estate and creditors. Thus, good causes exists to grant the Sale Motion so that the I do not lose
16 this favorable business opportunity.

17 I declare under penalty of perjury under the laws of the United States of America that the
18 foregoing is true and correct.

19 Executed on December 31, 2009, at Irvine, California.

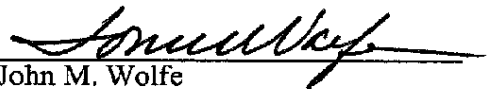
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EXHIBIT 1
Bankruptcy Schedules A, C and D

In re Gerald M. Allen	Case No.:
Debtor.	(If known)

SCHEDULE A - REAL PROPERTY

DESCRIPTION AND LOCATION OF PROPERTY	NATURE OF DEBTOR'S INTEREST IN PROPERTY	HUSBAND, WIFE, JOINT OR COMMUNITY	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION	AMOUNT OF SECURED CLAIM
Single Family Residence 2601 N. Ashwood St. Orange, CA 92865	Fee Owner		\$ 322,800.00	\$ 272,800.00
Total ➤			\$ 322,800.00	

(Report also on Summary of Schedules.)

Form B6C - (12/07)

2007 USBC, Central District of California

In re Gerald M. Allen	Case No.:
Debtor.	(If known)

SCHEDULE C - PROPERTY CLAIMED AS EXEMPT

Debtor claims the exemptions to which debtor is entitled under:

(Check one box)

☐ Check if debtor claims a homestead exemption that exceeds \$136,875

☐ 11 U.S.C. § 522(b)(2)

☒ 11 U.S.C. § 522(b)(3)

DESCRIPTION OF PROPERTY	SPECIFY LAW PROVIDING EACH EXEMPTION	VALUE OF CLAIMED EXEMPTION	CURRENT VALUE OF PROPERTY WITHOUT DEDUCTING EXEMPTION
1974 16 Foot Runabout	C.C.P. §§ 704.010, 703.150	350.00	500.00
1992 Ford Truck	C.C.P. §§ 704.010, 703.150	1,200.00	1,200.00
1996 Plymouth Voyager	C.C.P. §§ 704.010, 703.150	1,000.00	1,000.00
Comic Book Collection	C.C.P. §§ 704.040, 703.150	500.00	500.00
Daily Clothing	C.C.P. § 704.020	500.00	500.00
Furniture, TV & Appliances	C.C.P. § 704.020	2,000.00	2,000.00
Single Family Residence 2601 N. Ashwood St. Orange, CA 92865	C.C.P. § 704.730(a)(1)	50,000.00	322,800.00

Form B6D - (12/07)

2007 USBC, Central District of California

In re Gerald M. Allen	Case No.:
Debtor.	(If known)

SCHEDULE D - CREDITORS HOLDING SECURED CLAIMS

☐ Check this box if debtor has no creditors holding secured claims to report on this Schedule D.

CREDITOR'S NAME AND MAILING ADDRESS INCLUDING ZIP CODE AND AN ACCOUNT NUMBER (See Instructions Above)	CODEBETOR	HUSBAND, WIFE, JOINT OR COMMUNITY	DATE CLAIM WAS INCURRED, NATURE OF LIEN, AND DESCRIPTION AND VALUE OF PROPERTY SUBJECT TO LIEN	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM WITHOUT DEDUCTING VALUE OF COLLATERAL	UNSECURED PORTION, IF ANY
Last four digits of ACCOUNT NO. xxxx								
Ditech 3200 Park Center Drive,Suite 150 Costa Mesa, CA 92626			Second Lien on Residence Single Family Residence 2601 N. Ashwood St. Orange, CA 92865 Value \$322,800.00				22,800.00	0.00
Last four digits of ACCOUNT NO. xxxx								
GMAC Mortgage PO Box 4622 Waterloo, IA 50704			Single Family Residence 2601 N. Ashwood St. Orange, CA 92865 Value \$322,800.00				250,000.00	0.00

0 continuation sheets attached

Subtotal (Total of this page)	>	\$	272,800.00	\$	0.00
Total (Use only on last page)	>	\$	272,800.00	\$	0.00

(Report total also on Summary of Schedules)

(If applicable, report also on Statistical Summary of Certain Liabilities and Related Data.)

EXHIBIT 2
Letter From Buyer

POSER INVESTMENTS, INC.

150 N. SANTA ANITA AVENUE, SUITE 530
ARCADIA, CALIFORNIA 91006
(800) 333-1527 Ext. 114
FAX (626) 445-2029

October 28, 2009

John M. Wolfe
Chapter 7 Trustee
5450 Trabuco Road
Irvine, CA 92620-5704

Re: Gerald M. Allen
BK # 8:09-bk-17418-RK

Subject: Offer to Purchase Debtor's Home

Dear Mr. Wolfe:

The following is an offer to purchase the real property of the Debtor.

Property (Debtor's Home"), Address:
2601 N. Ashwood Street, Orange, CA 92865:

Bidder:
Richard Share, or nominee or assign

Purchase Price for Property:
\$368,000 cash, net of all escrow, title insurance, and related expenses.

All Selling Expenses to be Paid by Estate:

Seller shall pay all expenses of escrow, including the payment of a CLTA title insurance policy insuring that Buyer is obtaining a free and clear title to the Property with no liens upon the Property and no unpaid real estate taxes. All fees of escrow, including document preparation fees, escrow fees, recording fees, City and State transfer fees, title insurance fees, etc. will be paid by estate. There are no broker's fees or commissions.

Down Payment:
\$36,800. Balance to be paid at close of escrow

John M. Wolfe
Chapter 7 Trustee
October 28, 2009
Page 2

Condition of Property:

Buyer(s) will take Property in an "as is condition AS EXISTS ON DATE OF PHYSICAL INSPECTION OF THE PROPERTY, termite inspection and termite repairs are waived, Smoke Alarm Requirement Waived".

Conditions to Purchase:

1. This offer is conditioned on Buyer(s) approval of the Property within 14 days from date of physical inspection of the inside of house and yard. Inspection may be by Buyer, and such other persons reasonably deemed necessary for Buyer to conduct the inspection of the Property. There is NO loan approval or financing approval required.
2. The Property shall be verified as vacant 7 days or more from date of close of escrow.
3. The Property shall be in the same condition at close of escrow as existed on the date of physical inspection of the Property, which condition is to be verified by Buyer entering upon the premises to verify that tenant has in fact moved and that waste has not occurred.

Duration of Escrow:

Escrow to close in 30 days, or 7 days after verification that tenant has vacated the Property, and that Property is in same condition as existed at time of the physical inspection of the Property by Buyer, whichever is later. If escrow fails to close within 90 days from date of opening, escrow shall terminate, at Buyer's option. If the Property has been subject to damage after the inspection and prior to tenant vacating the Property, Buyer shall have the option to rescind this offer and receive the full amount of the down payment back from escrow without deductions. In that event, Trustee shall have the option to restore the premises to its condition at time of inspection and maintain an action against the Debtor for waste.

Prorating by Escrow:

Real estate taxes and interest, if applicable, shall be prorated by escrow in normal manner based upon the date of closing of escrow.

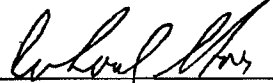
John M. Wolfe
Chapter 7 Trustee
October 28, 2009
Page 3

The Property appears to have some deferred maintenance issues from a drive by inspection of the exterior of the Property. I have assumed that their may also have some "normal wear and tear" damage to the interior of the house. My concern is as to the debtor who commits waste upon leaving the premises, such as tearing out cabinets, built in appliances, bathroom fixtures, etc..

When it comes time to chose a title insurance company and an escrow company, and if you would like to receive nominations that may be less costly, based upon my relationship with a title insurance company and an escrow company, please let me know.

I hope that this offer will be accepted by the estate, and be subject to a motion and overbidding procedures. Please do not hesitate to telephone me.

Sincerely,
POSER INVESTMENTS, INC.

By: 
Richard Hudson Share, Esq.